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No. [redacted] 141

Supreme Court of the United States

OCTOBER TERM, 1948.

CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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July, 1949.

UTTERBACK TYPESETTING CO., 13 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 3-8750

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No. 888

Supreme Court of the United States

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CLARENCE O. RUSSELL and RUBY RUSSELL,
Petitioners,

VERSUS

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF OKLAHOMA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In the Court of Appeals respondent contended that the judgment should be reversed because:

(1) The condition in the deed was void on its face;

(2) If not void, it was waived;

(3) The action was barred by limitations;

(4) If the condition was not void or waived, it was fully performed.

The Court of Appeals passed only upon the fourth contention, holding that the condition had been fully performed by the county's erection of the buildings within the time specified and its use of them for court purposes for more than 27 years. Since certiorari will not be granted

if the judgment of the Court of Appeals is correct for any reason, we shall briefly present all four of the grounds which we urged in that court.

I.

The condition was void because (1) the County Commissioners were without authority to make other than an outright and unconditional purchase, and (2) the condition was contrary to public policy.

County Commissioners can exercise only those powers expressly granted by law or those necessarily implied (*Tulsa St. Ry. Co.* v. *State,* 26 Okla. 559, 110 Pac. 373; *In re Assessment of First National Bank,* 64 Okla. 208, 166 Pac. 883).

They have no inherent powers, and those granted by law must be strictly construed, and their acts in excess thereof are void [*Hawks* v. *Hamill,* 228 U. S. 52; *State* v. *Board of Commissioners,* 188 Okla. 184, 107 Pac. (2d) 542; *Yocham* v. *Oklahoma County Election Board,* 198 Okla. 588, 180 Pac. (2d) 831].

All persons dealing with them are charged with knowledge of the limitations upon their powers, and must govern themselves accordingly [*Western Paint & Chemical Co.* v. *Board of Commissioners,* 161 Okla. 300, 18 Pac. (2d) 888; *Honnold* v. *Board of Commissioners,* 71 Okla. 71, 177 Pac. 71; *Graves* v. *Board of Commissioners,* 170 Okla. 282, 39 Pac. (2d) 532].

The authority of the Commissioners in 1903 to purchase or erect a courthouse or a jail was Sec. 1468, Rev. and Ann. Stat. of Okla. Ter. 1903, and was as follows:

"Whenever the Board of County Commissioners of any county in the Territory of Oklahoma considers it to be to the best interests of the county to purchase or erect a courthouse or jail, they shall have power to contract for the purchase or erection of same and to issue bonds in payment therefor."

Section 1229 of the same statutes, supplementing the authorization to purchase, provided that, "Any real or personal estate heretofore or which may be hereafter conveyed to any county shall be deemed the property of such county."

"The word 'purchase' connotes the transfer of ownership from a seller to a buyer" [*Replogle* v. *Indian T. I. O. Co.*, 193 Okla. 361, 367, 143 Pac. (2d) 1002]; and ordinarily the word, without more, means the acquisition of an absolute and unconditional title (*Camden & T R Co.* v. *Adams*, 62 N. J. Eq. 656, 51 Atl. 24). It meant that here, and not the acquisition of a defeasible estate which by forfeiture might entail upon the county the loss of the entire amount invested in the courthouse building and jail.

The Commissioners' powers, being strictly construed, were limited to doing the thing authorized and nothing else. In *State* v. *Allis*, 18 Ark. 269, the Court held that legislative authority to an agent to enter into a contract in the state's behalf granted only the power "to enter into a simple contract, and not a specialty or sealed contract." Here the Commissioners were authorized to make only a simple, straight-out purchase, and not a contract for the forfeiture of that which was purchased. The statute did not contemplate or intend that what was purchased should ever be forfeited.

The law is opposed to forfeitures, and conditions subsequent are not favored even as between private parties [*Stinson* v. *Oklahoma Ry. Co.*, 190 Okla. 624, 126 Pac. (2d) 260]. That being true, should a simple authority to County Commissioners "to purchase" for courthouse purposes be construed to authorize an agreement to which the law was opposed even as between individuals, an agreement for the forfeiture of that which was purchased? Is the law, without any words so indicating, to be construed to authorize an agreement to which it is opposed and which might defeat the very purpose of the act, namely, the county's acquisition of ownership?

Also, it is everywhere held that conditions subsequent cannot be created by inference or implication; they must be express and are strictly construed. Can authority to County Commissioners, whose powers are limited and are strictly construed, to bind the county by conditions subsequent, arise from mere inference or implication?

In *School Committee* v. *Kesler et al.*, 67 N. C. 443, the Court said:

> "The school committee, under its power to acquire suitable sites for school houses by purchase or donation, were not authorized to accept a site and erect schoolhouses thereon at the public expense, if the title to the land was clogged by any such condition or qualification. The condition or qualification being repugnant and inconsistent with the object of the grant, is void, and must be rejected, * * * ."

In *Rogers* v. *Sebastian County*, 21 Ark. 440, the Commissioners located the county seat at Fort Smith and determined to build a courthouse there, and Rogers conveyed

to them a site as a donation. Later it was determined to build the courthouse at another place, and Rogers sued to recover the land. The Court held that, under the statute, "the Commissioners had no power to receive any donation of land from Rogers with a reservation or limitation expressed in the deed; and, if so, they certainly had no right to attach a condition to Rogers' absolute deed by parol agreement"; that the location of the county seat or courthouse could not be made to depend upon a contract with Rogers; and that Rogers could not recover the land. It is true that in that case there was a statute requiring that the purchase be outright; but, if the words "to purchase" here under consideration also meant an outright purchase, the acquisition of an unconditional title, then the situation in the two cases is the same.

Also the condition was contrary to public policy. It was the intent of the law that counties should not be divested of their property otherwise than by an authorized sale thereof. The law required that the purchase be for cash. By Section 1421 a fund was to be accumulated for that purpose, and by Sections 1468-73, where there was no fund, bonds were to be issued. The property was not to be purchased on credit or condition. Nothing short of an express grant of power to purchase upon conditions that might result in the forfeiture of the property and the loss of the investment in the buildings could authorize the Commissioners to bind the county by such conditions. Illustrative of public policy in that respect are the facts (1) that County Commissioners have no power to mortgage the county's lands or buildings (*Stewart* v. *Otoe County*, 2 Neb. 177; *Vaughan* v. *Forsyth*, 118 N. C. 636, 24 S. E. 425).

(2) Statutes providing generally for mechanics' liens are interpreted as not being applicable to a county's property, and "for this reason there can be no mechanic's lien on a county courthouse or on county buildings." (Boisot on Mechanics' Liens, Sec. 208; 2 Jones on Liens, Sec. 1375; Bloom on Mechanics' Liens, Sec. 192; *Hutchinson* v. *Krueger,* 34 Okla. 23, 124 Pac. 591; *Western Terra Cotta Co.* v. *Board of Education,* 39 Okla. 716, 136 Pac. 595; *School District* v. *Graham,* 45 Okla. 531, 146 Pac. 213; *Gloyd* v. *Morris,* 42 Okla. 75, 140 Pac. 1149; *National Fireproofing Co.* v. *Town of Huntington,* 81 Conn. 632, 71 Atl. 911). (3) No judgment against a county becomes a lien upon any of its property (Sec. 1234, St. 1903). The reason is that a mortgage or a mechanic's or judgment lien, by foreclosure and sale, might divest the county of its lands and buildings, and that reason is applicable to a purchase upon condition that may entail a forfeiture.

Moreover, the establishment and change of county seats and the location and relocation of courthouses therein are governmental powers granted by law, to be exercised from time to time for the best interests of the county and the general public. And, as said by the Supreme Court of Arkansas in *Rogers* v. *Sebastian County,* 21 Ark. 440, those powers cannot be limited by contracts which may result in "fettering the free and legal action of the County Court (Commissioners) *or sacrificing the property of the county.*"

The Supreme Court of Indiana held likewise in *Armstrong et al.* v. *Board of Commissioners,* 4 Blackf. 208, saying that, "There is no authority given to the Commissioners to make the location dependent upon a contract, nor are they authorized to make a contract"; and further saying

that, "It is clear that the appellants, having personal knowledge of the act and the powers of the Commissioners, could not, if those powers were exceeded, avail themselves of a supposed benefit or right arising from an act by the Commissioners, itself an evident excess of the powers committed to them."

Since the Commissioners had no power to contract that the county seat or the location of the courthouse should never be changed, their authority to purchase was not authority to purchase upon conditions that would either destroy the county's governmental power of change to meet changed conditions, or else would require that it pay all that was invested in the land and the courthouse for the privilege of exercising its governmental power.

In *St. Louis, Jacksonville & Chicago Ry. Co.* v. *Mathers,* 71 Ill 592, the Legislature had chartered the railroad company and invested it with the power of eminent domain for the general welfare. Mathers conveyed to the railroad certain land on condition that no depot should be established within three miles of a certain town. Subsequently a depot was established in violation of the agreement, and Mathers sued to recover the land. The Court said:

> "The validity of a condition subsequent depends upon its being such as the law will allow to divest an estate, for if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. 1 Story's Equity, par. 288; 4 Kent's Coms. (8th Ed.) 134; 1 Washburn on Real Estate (2nd Ed.), 469."

Further on, the Court said:

"The alleged agreement or condition, on account of the non-performance of which relief is here sought, was, that a railroad company, chartered by an act of the legislature, and invested with the power of condemning private property, upon the ground that its road is for the public use, shall not establish a depot or station within three miles of Ashland. It can not be pretended, for a moment, that the board of directors had authority to make such an agreement or condition. They were trustees both for the public and the stockholders of the company, and in the discharge of their two-fold duty, were required to act with reference to the public convenience, on the one hand, and the private interests of the stockholders upon the other. Between these there was no conflict, for the greater the local conveniences for the use of the road by the public, the greater would be its local business, and, of consequence, the profits of the stockholders. The interests, therefore, both of the stockholders and the public, forbid that there should be a positive prohibition against the establishing of stations at any points on the line of the road. Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it."

And the Court held the condition void. Of course, the County Commissioners were as much trustees for the pubic as were the directors of the railroad, and as such were under a continuing duty to act in accordance with the best interests of the public, which might change from time to time,

and they could no more disable themselves by contract from doing so, or subject the county's property to forfeiture for doing so, than could the railroad in the above case.

It is submitted that the Commissioners had authority to make only an absolute and unconditional purchase and that the condition was void.

The Condition Being Void, the Deed Vested in the County an Absolute and Indefeasible Title to the Property.

Excepting the purported condition, the deed was in the usual form with a covenant of warranty. It conveyed an estate in fee simple purportedly terminable upon a condition subsequent [*Oklahoma City* v. *Local Federal Savings & Loan Association,* 192 Okla. 188, 134 Pac. (2d) 565].

From common law days until now, it has been the law that, if a condition subsequent in a deed which purports otherwise to convey a fee simple title is unlawful, contrary to public policy or otherwise void, or is or becomes impossible of performance, it will be rejected and the deed will pass an unconditional title in fee simple (Blackstone, bk. II, p. 156; 19 Am. Jur., Title "Estates", Sec. 77; 2 C. J. S., Title "Deeds", Sec. 146, p. 479).

II.

The condition was waived, and the trial court's judgment was based, not upon it, but upon another which the court itself formulated and substituted for it. That it had no power to do.

The law abhors forfeitures and does not look with favor upon conditions subsequent, for which reason they are construed with the utmost strictness, as the law books say,

"strictissimi juris" [*Stinson* v. *Oklahoma Ry. Co.*, 190 Okla. 624; *Columbia Ry. Etc. Co.* v. *South Carolina*, 261 U. S. 236, 248; *Oregon & Calif. Ry. Co.* v. *United States*, 238 U. S. 393; *Second Church of Christ* v. *LePrevost*, 67 Ohio App. 101, 35 N. E. (2d) 1015].

They cannot be created, proved or enlarged by parol, but must be clearly expressed in the deed. Nothing unexpressed is implied. What is expressed is strictly construed. And the evidence must bring the case squarely within the condition. No unexpressed condition can be added by parol, by implication, or by judicial construction [*Smith* v. *School District* (Ark.), 94 S. W. (2d) 706; *Peerless Carbon Black Co.*, v. *Gillispie*, 87 W. Va. 441, 105 S. E. 517; *Allen* v. *Trustees of Great Neck Free Church*, 269 N. Y. S. 341, 265 N. Y. 570, 193 N. E. 324; *Engel* v. *So. Penn. Oil Co.* (W. Va.), 146 S. E. 385; *Shields* v. *Harris*, 190 N. C. 520, 130 S. E. 189; *Petition of Copps Chapel M. E. Church*, 120 Ohio St. 309, 166 N. E. 218; *Toole* v. *Christ Church* (Tex.), 141 S. W. (2d) 720; *Gramer* v. *Sacramento* (Calif.), 41 Pac. (2d) 543; *Columbia Building Co.* v. *Cemetery of Holy Cross* (Md.), 141 Atl. 525; *Gladewater County Line Indp. School Dist.* v. *Hughes*, 59 S. W. (2d) 351, affirmed 76 S. W. (2d) 471].

Any ambiguity in the deed or defect in the evidence offered to show a breach will be taken most strongly against the grantor and in favor of the grantee [*Fitzgerald* v. *Modoc* (Calif.), 129 Pac. 794; *Ralston* v. *Hatfield* (Ind.), 143 N. E. 887; *Hitz* v. *Flower* (Ohio), 135 N. E. 450; *Columbia Gas & Elec. Co.* v. *South Carolina*, 261 U. S. 236; *Berger* v. *Santa Fe College* (N. Mex.), 215 Pac. 825].

The condition required that the court house and jail be "erected *on said ground herein conveyed,*" and that the trees be planted on "said ground" (4-5). The breach of the condition alleged was that respondent "never at any time erected a courthouse and/or a jail on said land, although it did erect a courthouse part of which was on said land, and in that it never did use any building erected on said land or any part thereof for jail purposes" (2).

Petitioner testified that before the jail was erected he knew that it was to be, not upon any land described in the deed, but upon other land which he himself conveyed to the county on October 17, 1905, by an unconditional deed (18) for a consideration of $1750 (106-107). He also testified that he lived in Oklahoma City when the courthouse was being erected and that he saw and knew that the greater part of it was being built upon other land, that he made no objection or protest, and that the location of the courthouse and jail was satisfactory to him (105-106, 108). Following that, he testified as follows:

Q. "Counsel asked you if you knew of the fact that the courthouse and jail were erected partly on your lots and partly on other lots? As a matter of fact, you waive any objection to the fact that the courthouse is only partly located on your lots and partly on other lots?

A. I make no objection now and never have.

Q. You make no objection now and never have?

A. No" (117-118).

The court's third finding of fact was as follows:

"Before January 1, 1910, the defendant erected a courthouse partly on the land described and partly on

adjoining land, and erected a jail on still other land. This breach of the conditions of the deed was known to the complainants at the time and was waived by them" (28).

We have, therefore, as petitioners contended and the court found, a condition subsequent that the respondent would erect "*on said ground herein conveyed* a courthouse and jail" on or before January 1, 1910; and we have that condition breached in 1904 and 1905 by the erection of a courthouse more than half of which was on land other than that conveyed and of the jail upon other ground entirely, which facts were fully known to petitioners at the time. Petitioners' standing by and seeing the county expend enormous sums in constructing the courthouse and jail upon other land than that described in the deed, without objection or protest, operated to waive the condition, and petitioners testified and the court found that they did waive it.

That waiver precluded the recovery of the land for failure to build a courthouse and jail upon it; and there is no contention or evidence that the county ever contracted with petitioners to substitute any other condition for the one that was expressed and waived. Petitioner testified that neither when the construction was commenced nor at any time while it was being carried on did he have any conversation with the County Commissioners about it, and that he made no objection to the location of the court house and jail (106). In fact, he sold the county by an unconditional warranty deed the land for the jail on October 17, 1905.

Petitioner's waiver, therefore, was a unilateral act, a waiver pure and simple, and was not a contract between

him and the county [*Strange* v. *United States*, 282 U. S. 270, 276; *Big Four Oil & Gas Co.* v. *Heiner*, 57 Fed. (2d) 29; *Bertelsen & Petersen Engineering Co.* v. *United States*, 60 Fed. (2d) 745, 747; *Schwartz* v. *Wilmer*, 90 Md. 136, 144, 44 Atl. 1059; *Clark* v. *Dye*, 158 Minn. 217; *Champion Spark Plug Co.* v. *Automobile Sundries Co.*, 273 Fed. 74, 79; *G. S. Johnson Co.* v. *Nevada Packard Mines Co.*, 272 Fed. 291, 305].

There is no evidence or contention that the county ever agreed that any other condition should be substituted for the waived condition stated in the deed. No agreement was alleged or proved to the effect that the alleged condition of perpetual use of the courthouse and jail to be erected upon the land conveyed should be transferred to and be applicable to a courthouse and jail erected, not upon that, but upon other land.

If the deed had been conditioned upon the county's perpetually maintaining the courthouse and jail upon the land conveyed, and it was not, that condition would have been waived by the waiver of the requirement that the courthouse and jail be erected upon that land. The waiver of their erection there would have waived a requirement that they be maintained there, for erection necessarily precedes maintenance. And, since the deed contained no provision relating to a courthouse and jail upon any other land, there was, of course, no requirement that a courthouse and jail upon other land be continuously maintained. In short, when petitioners waived the condition that the courthouse and jail be erected upon the land conveyed, they waived any requirement as to their maintenance anywhere, for

the condition related only to the courthouse and jail upon the land conveyed.

Contrary to the rule of strict construction, the court interpolated into the condition a provision it did not contain, namely, that, in addition to erecting the courthouse and jail "on said ground herein conveyed," the county should perpetually use the same for those purposes; and it applied that interpolated condition to a courthouse and jail not erected on the land "herein conveyed," to a courthouse and jail to which the condition did not relate. The condition with reference to the courthouse and jail "on said land herein conveyed" does not apply to a courthouse and jail on other land. Petitioner's waiver of the location of the courthouse and jail waived his right to retake the property upon the county's ceasing to maintain them at a different place from that specified in the deed. The waiver of those conditions waived all conditions, and the deed immediately became absolute. In *Dakin* v. *Williams*, 17 Wend. 447, a portion of the syllabus is as follows:

> "Where an estate is granted subject to a condition, and the grantee is released from the performance of a part thereof, the whole condition is gone, and the estate is wholly free and discharged of the condition."

A condition subsequent may be waived [*Pence* v. *Langdon*, 99 U. S. 578, 581; *Swain* v. *Seamens*, 9 Wall. 254, 274; *American Darigold Corp.* v. *Darigold Metals Corp.* (6 C. C. A.), 125 Fed. (2d) 446, 454; *First Federal Trust Co.* v. *First National Bank* (9 C. C. A.), 297 Fed. 353, 357; *Kansas City Life Ins. Co.* v. *Davis* (9 C. C. A.), 95 Fed. (2d) 952; *Pokegema Sugar Pine Co.* v. *Klamath River Co.* (C. C.), 96 Fed. 34, 54].

A condition once waived is wholly gone. The estate becomes absolute in the grantee, and cannot be divested by any subsequent breach [*Wilkes* v. *Groover*, 138 Ga. 407, 75 S. E. 353; *Chicago Sanitary Dist.* v. *Chicago Title & Trust Co.*, 278 Ill. 529, 116 N. E. 161; *Guild* v. *Richards*, 82 Mass. 309; *Rice* v. *Boston & W R Co.*, 94 Mass. 141; *Barrie* v. *Smith* (Mich.), 10 N. W. 168; *McCue* v. *Barrett* (Minn.), 109 N. W. 594; *Hebrew Orphan Asylum* v. *New York*, 270 N. Y. S. 310; *Schulman* v. *Ellenville Electric Co.*, 273 N. Y. S. 530; *Sharon Iron Co.* v. *Erie*, 41 Penn. 341; *Board of Education* v. *Baker*, 124 Tenn. 39, 134 S. W. 863].

III.

The action was barred by limitations.

The condition was that if respondent should "fail and neglect to have erected *on said ground herein conveyed* a courthouse and jail to be used for court and jail purposes for said county on or before the first day of January, 1910," then the property should revert. The courthouse and jail were not erected upon the land conveyed on or before January 1, 1910, or thereafter. That being true the condition stood broken on January 2, 1910, petitioners' right of re-entry and their cause of action to recover the land accrued, and Oklahoma's fifteen-year statute of limitation then and now in effect [Okla. Stat. 1941, Sec. 93(4)] commenced to run against them on that day, and had fully run on January 2, 1925. This action was not filed until April 9, 1946 (1-8), more than twenty-one years after it had become barred.

IV.

If the condition was not void, and was not waived, then it was fully performed.

The trial court construed the deed to require the perpetual use of the property for court purposes (28, 29 and 30). That is contrary to the unambiguous terms of the deed and to all the decisions upon the subject.

The deed was made for a valuable consideration passing to petitioners, as distinguished from a donation or deed of gift or a deed for a nominal consideration. That consideration was $4,000 in cash, and the assignment to petitioners of all the subscriptions for donations that had been made by the citizens (83), and the benefit that would accrue to petitioners from the building of the courthouse, they then owning other lots in the same block. In such cases, the courts lean still more strongly away from conditions that would create a forfeiture [*Toole* v. *Christ Church* (Tex.), 141 S. W. (2d) 720].

None of the words "permanent" or "permanently", "perpetual" or "perpetually" or "maintained" is to be found in the deed. The deed states that the property is granted "for the purpose of building a courthouse thereon"; but it is universally held that the statement in a deed of the purpose of the grant does not create or enlarge a condition subsequent, but that the condition itself must be stated in unambiguous language (*Avery* v. *United States,* 104 Fed. 711; *Scovill* v. *McMahon,* 62 Conn. 378, 26 Atl. 479; *Dunne* v. *Minsor,* 312 Ill. 333, 143 N. E. 842; *Rawson* v. *School District* 89 Mass. 125).

The statement in the deed, therefore, that it was made "for the purpose of building a courthouse thereon" did not constitute or enlarge the condition.

The condition was as follows:

> "That if the said grantee shall fail and neglect *to have erected* on said ground herein conveyed a courthouse and jail to be used for court and jail purposes for said county on or before the first day of January, 1910, and shall fail to plant good healthy shade trees to ornament said ground, and make sufficient appropriation each year to procure proper care to be taken of such trees and ground, so that said trees shall live in a healthy condition", then the property shall revert.

Leaving out of consideration for the present the change in the location of the courthouse and jail and petitioner's waiver, and considering the condition just as though the courthouse and jail had been built upon the land conveyed by petitioner, we say that the condition was fulfilled. The county did not fail to "have erected" a courthouse and jail to be used for court and jail purposes on or before the first day of January, 1910, or to plant and maintain good healthy shade trees. The deed contained no condition that the courthouse and jail should be used as such forever or for any certain time. It only required that they be "erected" on or before January 1, 1910, for court and jail purposes. That required that their erection be in good faith for such purposes; and when they were erected on or before January 1, 1910, with the good faith intention of using them for court and jail purposes, and their erection was followed by their use for such purposes for 33 years, and the trees were planted and cared for during the same period, the condition

was fulfilled, and petitioner was without right to retake the property upon the county's then ceasing to use it for court and jail purposes, or upon its ceasing to care for the trees.

The court's finding interpolates into the condition a provision that the county shall not only erect the courthouse and jail on or before January 1, 1910, but also that it shall use them for that purpose forever thereafter. There is no such provision in the deed nor anything like it. The condition is to be strictly construed, and that additional condition could not be created and cannot be proved by parol [*Thompson* v. *Thompson*, 9 Ind. 323; *Gadberry* v. *Sheppard*, 27 Miss. 203; *East Line & Red River Ry. Co.* v. *Garrett*, 52 Tex. 133; *Galveston H & S A RR Co.* v. *Pfeuffer & Ireland*, 56 Tex. 66; *Buszozak* v. *Wolo*„ 211 N. Y. S. 557; *Blewitt* v. *Boorum*, 142 N. Y. 357, 37 N. E. 119; *Hamlin* v. *Hamlin*, 192 N. Y. 164, 84 N. E. 805; *Stiebel* v. *Grosberg*, 202 N. Y. 266, 95 N. E. 692; *Lafayette Street Church Society* v. *Norton*, 202 N. Y. 379, 95 N. E. 819; *Rogers* v. *Sebastian County*, 21 Ark. 440; *Marshall County High School Co.* v. *Iowa Evangelical Synod*, 28 Iowa 360].

In *Dunbar* v. *Stickler et al.*, 45 Iowa 384, 386, the Court said:

> "Where a conveyance is made upon a condition, the condition expressed in the deed must be conclusively presumed (in the absence of fraud, accident or mistake) to be the only condition, and if that condition is kept the title cannot be successfully assailed. To engraft upon the condition expressed in the deed another by parol would be to vary by parol the legal effect of the deed. That this cannot be allowed is substantially

held in *Isett et al.* v. *Lucas,* 17 Iowa 503. See also *Henderson* v. *Henderson,* 13 Mo. 152."

The courthouse was erected in 1904 and the jail in 1905. They were erected for court and jail purposes. They were substantial stone buildings, and, subject to the possibility that time and the city's growth and changed circumstances might otherwise require, they were intended for permanent use. They were so used continuously from 1904 until 1937, a period of 33 years, during which time the city increased in population from about 35,000 to nearly 300,000 people, the courthouse became wholly inadequate, its location inconvenient, and the building itself unsafe. When that happened, the people of the county changed the location and voted bonds to build a new one, in the exercise of power granted them by law.

A condition that the county should erect a courthouse and jail "to be used for court and jail purposes * * * on or before the first day of January, 1910", is not a condition that the building or the land be forever used for that purpose.

A case squarely in point is *Mead* v. *Ballard,* 74 U. S. 290. There lands were conveyed "upon the express understanding and condition" that a certain institute "shall be *permanently* located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money without interest, the said land shall revert to and become the property of said grantors." The buildings were located upon the land and were maintained up to 1857, about nine years, when they burned down and were never rebuilt, a larger

building being erected upon an adjoining tract. The grantor sued to recover the land. It will be observed that the condition in that case was stronger than in this one, as it provided that the institution should be "permanently" located upon the land on or before a certain date. The Court held that the condition in the deed was the permanent location of the building on or before September 7, 1848, and that when the trustees passed a resolution locating the building upon the land with the intention that it should be the permanent place of conducting the business of the institution, they had literally fulfilled the requirement of the deed, and that all right of reversion was ended.

If, in that case, we should substitute the word "erected" used in this deed for the word "located" used in that one, and the 1st day of January, 1910, for the 7th day of September, 1948, the situation in each case would be exactly the same. There the deed used the word "located". Here it used the word "erected". There the deed required that the location be permanent. Here the deed did not purport to require permanency. But this Court held that the word "permanently" did not mean that the land must forever thereafter be so used, but required only that the building be located with the good faith intention of using it permanently, and that when that was done, the condition was fulfilled and all right of reversion was at an end. It said that the thing to be done was something which could have been done and completed within the year terminating on September 7, 1848, and that if it was done within that time, the right of reverter was gone. Here the thing to be done was to be done "on or before the first day of January, 1910", and if it was done within that time, then all right

of reverter was gone. The words in the deed, "to be used for court and jail purposes", denote only purpose and not duration.

Another decision of this Court squarely in point is *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, which is quoted from in the decision of the Court of Appeals. Other cases holding likewise are:

—*Bryan* v. *Louisville & N. R. Co.* (8 C. C. A.), 244 Fed. 650;

Texas & Pacific R. Co. v. *Scott* (5 C. C. A.), 77 Fed. 726;

Berkley v. *Union Pacific Ry. Co.*, 33 Fed. 794;

Hunt v. *Beeson*, 18 Ind. 380;

Hasman v. *Elk Grove Union High School*, 76 Cal. App. 629, 245 Pac. 464;

Whalen et al. v. *Baltimore & Ohio R. Co.*, 112 Md. 187, 76 Atl. 166;

Higbee v. *Rodeman*, 129 Ind. 244, 28 N. E. 442;

Sumner et al. v. *Darnell*, 128 Ind. 38, 27 N. E. 162;

Jeffersonville, Madison & Indianapolis R. Co. v. *Barbour*, 89 Ind. 375;

Brooks et al. v. *Kimball County*, 127 Neb. 645, 256 N. W. 501;

Romero et al. v. *Dept. of Public Works* (Calif.), 97 Pac. (2d) 871;

O. T. Johnson Corp. v. *Pacific Elec. Ry. Co.* (Calif.), 65 Pac. (2d) 368;

Booth v. *Los Angeles County*, 124 Calif. App. 259, 12 Pac. (2d) 72.

The only thing that the deed required as to the courthouse and jail was their erection "on said ground", and the only time specified in the instrument is that within which the erection shall be made, and, leaving out the question of waiver, that condition was literally complied with. Where a deed conveys property upon a condition subsequent that a building be erected for a certain purpose within a certain time, and the building is erected within the time and is intended for the purpose stated, the condition has been fulfilled. There being no provision in the deed that the use should be perpetual, such provision could not be shown by parol. There was no obligation to maintain the use perpetually.

REPLY TO SOME OF PETITIONERS' CONTENTIONS

Petitioners say that the property was located in Oklahoma and that the deed was executed there, and that therefore the interpretation and enforcement of its provisions "are governed by the laws of Oklahoma, both procedural and substantive, as found in its statutes and the decisions of its highest court." We know of nothing in the statutes or decisions in Oklahoma, and petitioners have pointed out nothing, which militate against our contentions. But the petitioners are wrong in saying that the questions are determinable by the statutes and decisions of the State of Oklahoma. The deed was executed in 1903 while Oklahoma was a territory of the United States, deriving all its powers from its Organic Act (Act of Congress, May 2, 1890, 28 Stat. at Large, pp. 81-100). Its Legislature (Sec. 4 of that Act) was an instrumentality of the United States,

and the laws enacted by it under the delegated authority were local laws of the United States. The deed was executed in 1903, almost four years before Oklahoma became a state, and throughout its life it meant what it meant on the date of its execution (*Oklahoma City* v. *Local Fed. Savings & Loan Assn.*, 192 Okla. 188; *Jones* v. *Oklahoma City*, 193 Okla. 637). Upon Oklahoma's admission into the Union, only such territorial laws became effective therein as were adopted by its Constitution, but Section 1 of the Schedule of that Constitution provided that "No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the form of government, but all shall continue as if no change in the forms of government had taken place." It follows, therefore, that no statutes enacted by the State of Oklahoma and no decisions of the latter's Supreme Court governed the interpretation of the deed, but that the same is to be interpreted in accordance with general law, and especially in accordance with decisions of this Court heretofore cited.

Petitioners contend that it was agreed that the deed was ambiguous; and upon that alleged agreement they predicate their contention that the oral testimony of petitioner, Clarence O. Russell, to the effect that it was orally agreed and understood between him and the Commissioners that the property should be used perpetually for court purposes was competent. As to that, we request the Court to read pages 36-42 of the transcript, which show that respondent consistently objected on the ground that the deed was not ambiguous, and that the alleged stipulation was in fact coerced. Also, the objection to the testimony men-

tioned was made after the making of the alleged stipulation, and constituted either a retraction of it or an exception to it. The facts were these:

After the alleged agreement petitioners offered the deposition of Clarence O. Russell in evidence (41). The court stated that he had read it, and that there was no use to read it again, whereupon respondent's attorney said:

> "Are you going to consider that here? There are certain self-serving elements in there I would like to reserve my objections to, if they may be considered."

To which the Court replied:

> "If it is satisfactory with you, can we consider it objected to and objection overruled? This is a court case, and I am not going to consider any evidence that is not competent" (41).

And petitioners' attorney stated that, "The defendant may have objections to any questions they desire, and it will be shown to be overruled" (42).

Notwithstanding respondent was given no opportunity to make specific objections to those particular questions and answers, and notwithstanding the court's overruling of the objections which he knew respondent intended to make, and his statement that, "I am not going to consider any evidence that is incompetent," the court considered and gave effect to petitioner's incompetent and inadmissible statements. Thus, in his sixth finding the court said (28):

> "At the instance of both parties, extraneous evidence was introduced at the trial to aid in the inter-

pretation of the conditions of the deed. *Upon this evidence* and the language of the deed * * * this court finds that it was the intention of the parties, *and particularly of the grantor*, that the grant was on the conditions (1) that the courthouse should be used continuously after its erection for courthouse purposes * * * ."

And in a memorandum or written opinion, he said:

"The real contention of defendant is that there was no agreement to use the ground *perpetually* for courthouse purposes, or to make appropriations to care for the trees any specified length of time. These matters are disposed of by contrary findings of fact. *The testimony of Mr. Russell is clear and convincing*" (30).

The court's statement that extraneous evidence was introduced at the instance of both parties to aid in the interpretation of the condition of the deed is not correct. Respondent introduced no extraneous evidence for that purpose. It did not introduce that deposition, and the only witnesses it introduced were J. M. Owen (72) and Mike Donnelly (85), and neither of them were asked to give or purported to give any testimony relating to the interpretation of the condition in the deed. The only evidence bearing upon that question was that of petitioner himself, introduced by his attorney over respondent's objection, and which the court stated would not be considered if incompetent.

Moreover, in fact, there was not the slightest ambiguity in the deed. Petitioner Russell's testimony that it was the agreement and understanding that the use of the property for court purposes should be perpetual was not only

incompetent, but was wholly without probative effect. Conditions subsequent cannot be created or enlarged by parol [4 Thomp. on Real Property (Perm. Ed.), Secs. 2039, 2044, 2096, and 2097; *Dunbar* v. *Stickler et al.*, 45 Iowa 384, 386].

It is everywhere held that except in actions to cancel or reform a deed, oral evidence is incompetent to change its legal effect [*Dixon* v. *McCann*, 87 Okla. 109, 206 Pac. 597; *Smith* v. *Godfrey*, 200 Iowa 768, 205 N. W. 366; *Kelley* v. *Saltmarsh*, 146 Mass. 585, 16 N. E. 460; *Morris Canal & Banking Co.* v. *Ryerson*, 27 N. J. L. 457, 466; *Union Selling Co.* v. *Jones*, 128 Fed. 672; and *Frenzer* v. *Frenzer* (8 C. C. A.), 2 Fed. (2d) 218].

Also it is the law that ordinarily, in interpreting deeds, they must be construed most strongly against the grantor and most favorably to the grantee [*Rogers* v. *Jones* (10 C. C. A.), 40 Fed. (2d) 333; *Edwards* v. *Brusha*, 18 Okla. 234, 90 Pac. 727; *Lowery* v. *Westheimer*, 58 Okla. 560, 160 Pac. 496; *Porter* v. *Warner-Caldwell Oil Co.*, 183 Okla. 1, 80 Pac. (2d) 252; *Levine* v. *Shaffer*, 190 Okla. 194, 122 Pac. (2d) 1010]. And that is particularly true as to conditions subsequent contained in them.

The purpose of the condition was fulfilled. Petitioner testified that he then owned other property "scattered all over Oklahoma City," some of which was in the same block as were the lots conveyed (104-107); and that, "if the courthouse was built anywhere within reasonable distance of the business center, it would have a tendency to increase values; it would increase values there"; that the construction of public buildings "tends to enhance the value of all real estate in the city, particularly in the business dis-

trict" (115). Petitioner received $4,000 in cash and the subscriptions of the citizens to induce the location for the lots conveyed, and he testified that before 1915 he had disposed of all his real estate near the courthouse (107-108), and by 1920 had disposed of all his property in the city (103). Having received the $4,000 in cash and the citizens' subscriptions and presumably enhanced prices for his other property, in 1918 he moved to California where he still resides (102-103). For 30 years before suing he had been a non-resident of the state and for 28 years had owned no property therein. He testified that, "I don't think I am damaged at this time" (111), and that the maintenance of the trees would be of no benefit to him personally (123). In addition, the courthouse and jail were constructed and used and the trees cared for to petitioner's satisfaction for 34 years. In that situation, the law says that the condition had served its purpose and was at an end.

In *Maddox* v. *Adair,* 66 S. W. 811, by the Court of Civil Appeals of Texas, the second and third syllabi are as follows:

> "Where a grantor conveys realty to be used for school purposes, in order to increase the value of adjacent property, on condition that, on the grantee's failure to establish and maintain the school, the premises shall revert, and a school is maintained until the grantee has disposed of his adjacent property, he cannot claim a forfeiture after discontinuance of the school, as the purposes of the condition were fulfilled.
>
> "The condition of the deed having been complied with, and the grantee's title perfected, the grantor can-

not complain of the abandonment of the property and the intrusion of a trespasser."

It is submitted that the petition should be denied.

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